COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2013-SC-000820-D

THE BOARD OF REGENTS OF
NORTHERN KENTUCKY UNIVERSITY — APPELLANT

v.

On Discretionary Review From Kentucky Court of Appeals
Case No. 2011-CA-002111-MR and Campbell County Circuit Court
Case No. 2009-CI-0432

ANDREA WEICKGENANNT — APPELLEE

BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE

It is hereby certified that the original and ten copies of the foregoing was served upon the following named individual via Federal Express, on October 10, 2014: Hon. Susan Stokely Clary, Clerk of the Supreme Court, Room 209, 700 Capital Avenue, Frankfort, Kentucky, 40601; and one copy of the foregoing was served via United States mail this 10th day of October, 2014, upon: Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Fred A. Stine, Chief Circuit Judge, Campbell County Circuit Court, 330 York St., Newport, Kentucky 41071; Sheila M. Smith, Esquire, and Kelly Mulloy Myers, Esquire, Freking & Betz, LLC, 525 Vine Street, Sixth Floor, Cincinnati, Ohio 45202.

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STATEMENT OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Appellant, Northern Kentucky University, is appealing a judgment which overturned the Campbell County Circuit's Order granting summary judgment to the University on Appellee, Andrea Weickgenannt's claim that she was terminated in violation of KRS 344 based upon her gender. The University requested discretionary review which was granted on August 13, 2014.

II. STATEMENT CONCERNING ORAL ARGUMENT

In accordance with CR 76.12(4)(c)(ii) Appellant Northern Kentucky University respectfully requests oral argument. This case presents a significant issue regarding the interpretation and application of a critical state employment statute, KRS Chapter 344, and the corresponding federal law, Title VII. Appellant believes that oral argument will assist the Court in deciding this issue as well as provide an opportunity for any needed clarification or further elaboration of the parties' positions on this issue.

III. STATEMENT OF THE CASE

A. Summary Of Facts

Andrea Weickgenannt began her employment at Northern Kentucky University in 2000 as an instructor in the College of Business' Accountancy Department. (TR 195, Exhibit 1, Weickgenannt Depo., pg. 47). Weickgenannt was hired into a "tenure track" position as an Assistant Professor in 2002 in the College of Business ("COB"), Department of Accountancy. (Id.) An award of tenure to a faculty member at a University at the conclusion of the "tenure track" ultimately results in a lifetime appointment and requires high expectations and a considerable commitment on the part of the University. (TR 195, Exhibit 3, Wells Depo., pg. 130). Reappointments of tenure track Assistant Professors are made on one-year terms with a mandatory requirement to apply for tenure by the end of the sixth year. (TR 195, Exhibit 2, Faculty Handbook, pg. NKU/Weick 00468[1]).

[1] Any citation to "NKU/Weick ___" is referencing the bate-stamped numbers of exhibits located on the bottom of documents produced in the University's Motion for Summary Judgment-TR 195-198.

1. University Policies and Procedures Regarding Tenure

Pursuant to University Policy and Procedures, NKU began its review process of Weickgenannt's candidacy for Reappointment, Promotion and Tenure or the "RPT" process in January 2003. The review process occurs annually evaluating the entire academic record of an assistant professor employed in a tenure track position, like Weickgenannt, in the areas of 1) teaching effectiveness; 2) scholarly and creative activity; and 3) institutional and public service, to determine if they should be reappointed each year to another year-long renewable contract. (TR 195, Exhibit 2, Faculty Handbook, NKU/Weick pg. 00472-00481). After five years of being issued renewable probationary contracts, assistant professors in a tenure track position are required to apply for tenure and promotion in their sixth year. (Id.) If they are not successful at that time for promotion and tenure demonstrating they are successful in all three areas, the individual is issued a terminal contract for the following year and is no longer eligible to apply for promotion and tenure. (Id.)

There is no disagreement that Weickgenannt's application for tenure illustrated that she was deemed effective in the categories of teaching effectiveness and institutional service. The University based its decision to deny Weickgenannt tenure on her scholarship contributions, specifically her inability to be a major contributing author for at least three peer-reviewed journals of high quality and for her failure to indicate continuing scholarship and active scholar status beyond the awarding of tenure and promotion. (TR 195, Exhibit 4, Votruba Affidavit, ¶¶8, 9; Exhibit 6, Votruba Depo., pg. 24-25; Exhibit 5, Wells Affidavit, ¶14; Wells Depo., pg. 28-29). Weickgenannt,

therefore, has argued that the University's evaluation of her scholarship contributions was inadequate.

The Faculty Handbook clearly establishes that a faculty member is not guaranteed tenure based upon the completion of a certain number of activities or the achievement of a specific goal in view of the fact that all faculty members are unique and have different paths to meeting the established tenure criteria. Additionally, the Faculty Handbook maintains that an evaluation of a faculty member's portfolio or tenure application, also referred to as a tenure "binder", is a subjective analysis made by those individuals tasked with reviewing it:

> Each of these three sections below-teaching, scholarship and creative activity, and service-lists a range of activities...It is most important to note that the demonstration of accomplishments by a faculty member in most or all of these activities does not necessarily represent a sufficient condition for reappointment, promotion, and/or tenure. Decisions regarding the value, appropriateness, and prioritization of faculty activities must be made by the department in which the faculty member resides, the Dean of the College and the Provost.

(TR 195, Exhibit 2, NKU/Weick 473, emphasis added). The applicable provision in the Faculty Handbook regarding "scholarship and creative activity" states that "the significance of the [faculty member's scholarship] may be reflected in such things as the reputation of the publication/presentation outlet, the citations or reviews of the work in other publications, and its influence on the discipline or some community of people." (TR 195, Exhibit 3, NKU/Weick 477).

The College of Business also established additional guidelines for Reappointment, Promotion, and Tenure that supplement the Faculty Handbook. (TR 195, Exhibit 7). The provision in the COB Guidelines applicable to a faculty member's scholarship includes the following:

B. Scholarly and Creative Activity (Research)

All works should be refereed, published in recognized academic or professional outlets, publicly available, and of good quality. The number of authors for each work will be taken into account. A portfolio normally should include the following three items:

1. An appropriate mix of at least ten total works (including item 2 below) from the following categories: [list of items a-n removed]

2. **A major contributing author of at least three journal articles.**

3. **Indication of continuing scholarship and active scholar status beyond the awarding of tenure and promotion.**

(Appendix 3/TR 195, Exhibit 7, emphasis added). As shown above, the plain language of the RPT process in the Faculty Handbook and the COB guidelines requires the reviewers to use independent judgment, as well as a subjective evaluation of the scholarly works included in the portfolio based on that individual's definition of "good quality" journals for publications, what constitutes being a "major contributing author", and an indication of "continuing scholarship." (TR 195, Exhibit 5, Wells' Affidavit, ¶10).

Pursuant to these same guidelines, there are five levels of review for each individual proceeding through the RPT process: 1) Departmental Committee; 2) Department Chair; 3) Dean of the College; 4) University Provost; and 5) University President who makes a recommendation to Board of Regents for approval; or conducts a substantive review in case of appeal. (TR 195, Exhibit 2, NKU/Weick 00481-00484).

Weickgenannt's former department, the Department of Accountancy, is located within the University's College of Business. The College of Business was comprised of five (5) separate departments: Accounting, Business Informatics, Construction Management, Management, and Marketing, Economics, and Sports Business each being

managed by its own Department Chair, and consisting of its own RPT committee made up of faculty members from within that department. Each candidate for reappointment, promotion, or tenure is judged independently of any other candidate and only based on their specific scholarship, university service, and teaching. (TR 195, Exhibit 5, Wells Affidavit, ¶10).

B. Weickgenannt's Application For Tenure

Weickgenannt was eligible to apply for promotion and tenure in September, 2007. However, the evaluations Weickgenannt received in the previous years are significant and foreshadow her unsuccessful tenure application and are briefly addressed below.

1. 2002-2003 Academic Year

During Weickgenannt's initial year of employment in her tenure track position, her evaluations from the RPT Committee, Dean, Provost, and President began in January 2003. (TR 195, Exhibit 8, 2002-2003 RPT Process Letters). For this academic year, Weickgenannt was evaluated as making satisfactory progress, and therefore positively recommended for reappointment by the RPT Committee in the Department of Accountancy, Chair Linda Marquis, Dean Michael Carrell, and Provost Rogers Redding. (TR 195, Exhibit 8).

2. 2003-2004 Academic Year

The following year Weickgenannt was again judged as making satisfactory progress and positively recommended for reappointment by the RPT Committee in the Department of Accountancy, Chair Linda Marquis, Dean Michael Carrell, and Provost Jerry Warner. (TR 195, Exhibit 9, 2003-2004 RPT Process Letters). The letters received

by Weickgenannt consistently explained her duty to continue working toward the tenure requirements. In fact, Provost Jerry Warner's letter stated:

> That this is a positive recommendation does not diminish the importance of your continuing to review carefully the *Faculty Policies and Procedures Handbook.* In particular, Section IV, B represents a careful effort to embody within evaluative criteria the balanced mission of a learning-centered University. As a tenure-track faculty member, you are responsible for knowing and endeavoring to address the stated criteria.

(TR 195, Exhibit 9, December 12, 2003 Letter to Plaintiff from Jerry Warner, NKU/Weick 44). This exact language, or very similar language, can be found in each of the letters received by Weickgenannt during the RPT process.

3. 2004-2005 Academic Year

In September, 2004, Weickgenannt began to be reviewed for the third year. It was at this point that the RPT Committee provided one of the first warnings to Weickgenannt concerning her lack of sufficient scholarly activity. (TR 195, Exhibit 10, 2004-2005 RPT Process Letters). Weickgenannt was expressly put on notice that she was being reappointed on probation with "conditions to be removed." Specifically, the condition cited was "Insufficient scholarly activity" and included the following language:

> While the statement of "a Condition to be Removed" presented in the recommendation should help you to envision some directions that you wish to take in order to strengthen your performance and portfolio, it is not meant to direct you to specific actions or to provide you with a definitive plan whose implementation will guarantee a positive decision on reappointment, promotion and/or tenure in the future. (TR 195, Exhibit 10, September 24 Letter to Plaintiff from Linda Marquis).

The letter also included the following counsel as seen on previous letters:

> I want to note that this is a positive recommendation while I also encourage you to review carefully the *Faculty Policies Handbook* and the *College of Business Guidelines for Reappointment, Promotion, and Tenure.* You should give special attention to Section IV, B. (Evaluation Criteria) in the *Faculty Handbook* and

Section 1.B. in the *COB Guidelines*. As a tenure-track faculty member, you are responsible for knowing and endeavoring to address the stated criteria.

(TR 195, Exhibit 10, September 24 Letter to Plaintiff from Linda Marquis, NKU/Weick 42).

Weickgenannt's Department Chair, Dr. Leslie Turner, Dean Carrell, and Provost Wells concurred with the RPT Committee's decision, and also recommended reappointment with a "condition to be removed" exclusively for "insufficient scholarly activity". The Chair, Dean, and Provost each cited to the same language as the RPT Committee explaining that Weickgenannt had an affirmative duty as a tenure-track faculty member to understand the evaluation criteria and that such counsel is not meant to give the candidate a "definite plan whose implementation will guarantee a positive decision on reappointment, promotion and/or tenure in the future." (TR 195, Exhibit 10, 2004-2005 RPT Process Letters).

4. 2005-2006 Academic Year

The following year Weickgenannt was recommended for reappointment by the RPT Committee, Chair, Dean, and Provost. (TR 195, Exhibit 11, 2005-2006 RPT Process Letters). However, even with this recommendation, the RPT Committee cautioned Weickgenannt "that continued emphasis on journal publication should be paramount in your plans for the upcoming years." (TR 195, Exhibit 11, October 5, 2005 Letter to Plaintiff from Linda Marquis, NKU/Weick 33).

5. 2006-2007 Academic Year

Beginning Weickgenannt's fifth year of review, it was again apparent that she was not making successful progress toward tenure under the Faculty Handbook or COB Guidelines. In this review period the RPT Committee recommended her for

reappointment but again advised her that "continued emphasis on journal publications should be paramount in [Weickgenannt's] plans for the upcoming year." Likewise, the Department Chair, the College Dean, and the University Provost unanimously agreed that Weickgenannt's reappointment should include "conditions to be removed" as she continued to have significant deficiencies with her scholarship output. (TR 195, Exhibit 12, 2006-2007 RPT Process Letters). Therefore, her reappointment included the condition to be removed of "insufficient scholarly activity" and the correspondence she received included the same language cautioning her to put an emphasis on her scholarly output:

> While the statement of "a Condition to be Removed" presented in the recommendation should help you to envision some directions that you wish to take in order to strengthen your performance and portfolio, it is not meant to direct you to specific actions or to provide you with a definitive plan whose implementation will guarantee a positive decision on reappointment, promotion and/or tenure in the future.

(TR 195, Exhibit 12, NKU/Weick 00019). Weickgenannt was warned on three separate occasions by multiple levels of review that her scholarship was insufficient and could result in a negative decision on tenure.

6. 2007-2008 - Mandatory Year for Tenure Review

Weickgenannt became a candidate for promotion to Associate Professor with tenure in September, 2007, her sixth year of evaluation. Pursuant to the process, Weickgenannt was reviewed by five members of the Department of Accountancy's RPT Committee, the Accounting Department Chair Les Turner, Dean John Beehler, and Provost Gail Wells. Each of these reviewers have a distinctive role to play in the process and are responsible for using their own independent judgment to make their determination on the merits of Weickgenannt's application for promotion and tenure.

(TR 195, Exhibit 3, Wells Depo., pg. 60) ("The RPT Committee, the Dean, and the Chair and the Dean all have a significant role to play [in assessing the candidate]").

Weickgenannt's portfolio at the time she applied for tenure is documented through the curriculum vitae/resume she submitted with her binder. (TR 195, Exhibit 13). Unlike the large majority of faculty members, Weickgenannt did not have a doctorate or a terminal degree in Accountancy, although she admits that most colleges and universities primarily focus on hiring faculty members with Ph.D.s. (TR 195, Exhibit 1, Weickgenannt Depo., pg. 44). Also significant are her limited number of "peer reviewed journal" publications. The COB Guidelines, as stated above, requires the candidate to be, "a major contributing author of *at least* three journal articles." (Appendix 3/TR 195, Exhibit 7). The three referenced peer-reviewed articles she submitted with her application, none of which were sole-authored by Weickgenannt, were as follows:

1. *Auditor's Self-Perceived Abilities in Conducting Domain Audits,* Critical Perspectives on Accounting with V. Owhoso.
2. *Spatelli's Pizzeria: Management of Accounting Information Systems,* The Journal of Accounting Case Research with P. Theuri and L. Turner.
3. *Emphasis on the Statement of Cash Flows in Introductory Financial Accounting Courses: Its Effect on Student Perceptions,* The National Accounting Journal with P. Theuri and L. Turner.

When applying for tenure, the burden of proof is upon the faculty member seeking to demonstrate that she has the capacity and has established a record that shows she has the capacity to sustain a lifetime of excellence in teaching, scholarship, and service. (TR 195, Exhibit 2, Wells Depo., pg 26; Votruba Depo., pg. 18). Upon review of Weickgenannt's application for tenure, the Department of Accountancy's RPT Committee recommended that she be granted tenure. (TR 195, Exhibit 14, 2006-2007 RPT Process letters). Included in their letter to Weickgenannt was a warning that her application

"remained subject to the consideration and recommendation of the Department Chair, Dean, and Provost and approval by the Board of Regents." (TR 195, Exhibit 14, NKU/Weick 00015). The RPT Committee's recommendation was received by the Chair, Dr. Leslie Turner and he also recommended to Dean Beehler that Weickgenannt be granted tenure. (TR 195, Exhibit 14, NKU/Weick 00011-12). Dr. Turner included the same warning to Weickgenannt that her application remained subject to the recommendations of the Dean, Provost and the Board of Regents. (Id.)

a. Dean Beehler's Decision

In September, 2007, Dean John Beehler had only been the Dean of the College of Business at NKU for a few months and had never previously participated in the University's RPT process. (TR 195, Exhibit 16, Beehler Depo., pg. 35-36). However, prior to joining NKU, Dean Beehler held various other academic roles including Dean of the Barton School of Business at Wichita State. (Id. at 8-9). Dean Beehler holds a Bachelor of Science in Accounting with highest honors in the Accounting Honors Program from Penn State University; an MBA in Finance and Taxation from Indiana University; and a Ph.D. in Business. His field of study was accounting with a focus on taxation and a minor in law from the Indiana University Law School. (Id. at 18-19).

Upon receiving Dr. Turner's positive recommendation, Dean Beehler made a "thorough review of all the facts, her dossier...based on an investigation by [Dean Beehler] of exactly the policies and procedures, both for the University and the Business School, because [he] wanted to -- as a new person at the University, [he] wanted to understand the rules. So [he] was trying to gather information to make [him] both understand the policies and procedures as well as understand Andrea's

contributions...That's why you have multiple levels of decision-making, so that everybody looks at the case with their own eye, with their own perspectives, and with their own information available." (TR 195, Exhibit 16, Beehler Depo., pg. 65-66).

Dean Beehler, whose area of study is Accounting and is well-regarded in this field, went through the same exact procedure when he reviewed Weickgenannt's case as he did the other seven tenure cases that particular year and believes to have actually spent more time on her case than any other case, because it was, indeed, a "borderline case." (Id. at 67-68). A well-published accountant himself, Dean Beehler was acutely aware of quality accounting scholarship and its journals. As an example in reviewing the *National Accounting Journal,* at a minimum Dean Beehler took eight steps in evaluating its value as highlighted through his testimony including calling a colleague at another university and checking the national rankings. His colleague had never heard of the journal. (Beehler Depo., pg. 83-85). Based upon Dean Beehler's uncontested testimony, he took many steps, and much time and effort to determine the quality of the *National Accounting Journal* and assessed its value on a number of factors. However, Dean Beehler based his decision to deny Weickgenannt tenure on a number of factors other than the *National Accounting Journal*:

> And there is a part in here about talking about the lack of continuing commitment to do scholarly activity in the future. I think, to me, that the idea of having a research stream and providing evidence that you will continue to do research in the future is important, because if you recall, there were two things in my letter that I indicated that I had an issue with. One was the minimum number of articles, and the other one was lack of continuing commitment to do scholarly activity in the future. (Beehler Depo., pg. 126-127).

The many steps Dean Beehler testified he actually took in assessing the quality of the *National Accounting Journal* in conjunction with the fact he also determined

Weickgenannt lacked continuing commitment to do scholarly activity in the future was the reason he recommended against tenure. Consistent with his testimony, Dr. Beehler's recommendation to deny tenure stated that the primary reasons for his decision were, "minimal number of articles in refereed journals of good quality"; and "lack of evidence of a continuing commitment to scholarly activity in the future." (TR 195, Exhibit 14, NKU/Weick 00010).

b. Provost Gail Wells' Decision

Dean Beehler made his recommendation to deny tenure on November 26, 2007 to Provost Gail Wells. (Id.) From 2004 through 2013, Provost Wells was the chief academic officer of Northern Kentucky University with the responsibility for all of the academic components of the University. (TR 195, Exhibit 3, Wells Depo., pg. 18-19). Among many other responsibilities, the Deans of the six Colleges reported directly to her. She has been employed by the University since 1980 and became a tenured faculty member in 1986. (Id. at 21). Provost Wells holds a Bachelor's degree, Master's degree, and a Doctorate of Education. She has also completed the Educational Leadership Program at Harvard University. (Id.)

The Provost typically received the recommendations with applications for reappointment and tenure the first week of November every year. (TR 195, Exhibit 3, Wells Depo., pg. 24). Although it is a challenging endeavor, the Provost thoroughly reviewed each binder submitted and read every document included by the faculty member at least once in the six year process, "cover to cover" to determine if they meet the standards described in the Faculty Handbook. *(Id.)* She "looks carefully at the records of accomplishment that person has established, in all three fields [of teaching,

scholarship, and service]" and if they are up for tenure, she reviews them to determine "whether or not they have provided evidence that they can sustain a career of excellence in those three fields, and therefore deserve tenure." (TR 195, Exhibit 3, Wells Depo., pg. 24, 26-27).

Of the highest importance in a review of the binder is the quality of work and ability of the faculty member to continue this high quality work into the future. Provost Wells believes these guidelines clearly spell out the expectations;

> "the Faculty Handbook has clear guidelines ...it needs to be of the highest quality. It needs to be reputable....You also are looking...to see if a person can sustain a career of excellence in scholarship. So you're definitely looking to make sure that they have had some consistency over their probationary period, that they've made progress as they've gone along, that they have an upper trajectory, you want their best years to be ahead of them, and that they have a momentum that's going into the future." (Exhibit 3, Wells Depo., pg. 28-29).

Whenever there is a disagreement among the four levels of review on a faculty member's application for tenure, the Provost typically speaks with the first level of disagreement. (TR 195, Exhibit 3, Wells Depo., pg. 35). In this case, Provost Wells contacted Dean Beehler to discuss his recommendation, which differed from the assessment of the Department Chair. (Id.) Thereafter, the Provost began her independent and separate review of Weickgenannt's application and binder. What immediately struck the Provost as problematic was the fact that upon reading one of the new articles contained in Weickgenannt's binder, *Auditors' Self-Perceived Abilities In Conducting Domain Audits,* she recognized it as being remarkably similar to an article she had read a previous year that was sole-authored by Dr. Vincent Owhoso, a fellow tenured faculty member of the Accountancy Department. (Id. at 49-50). Provost Wells immediately obtained Dr. Owhoso's personnel file, and located the article similarly titled which had

been completed prior to Dr. Owhoso becoming a faculty member at NKU or even meeting Weickgenannt. (Id. at 50). Provost Wells compared the article Weickgenannt was now submitting as one of her three peer-reviewed journals, to that of Dr. Owhoso's sole-authored article submitted years earlier, and underlined the content in pencil that was identical, or especially similar. (Id.)

Provost Wells concluded "that there was very little about the paper, in terms of the methodology, the hypothesis, the statistical analysis, very little that had changed from the papers." (Id. at 53). However, she believed it was "certainly something that should still count in [Weickgenannt's tenure] portfolio, but it wouldn't be weighted as highly as if she had been the one that had the idea from the start, and if she in fact, had determined the methodology, the hypothesis, the original literature review, and so forth. So it just couldn't be weighted as heavily as it would have been otherwise." (Id.)

Provost Wells therefore determined that Weickgenannt had not sufficiently met the guidelines of the Faculty Handbook or the COB Guidelines which state that the faculty member must demonstrate an "indication of continuing scholarship and active scholar status beyond the awarding of tenure and promotion." Provost Wells denied Weickgenannt tenure exclusively based on her scholarship, and after Weickgenannt received multiple warnings over the previous years, "now the time was up, and she had never demonstrated that she could be a lead author on a piece." (Id. at 63).

Although the fact that the Provost did not consider the Plaintiff a major contributing author to the article, *Auditor's Self-Perceived Abilities in Conducting Domain Audits*, as the most significant reason to not recommend tenure, Provost Wells also had concerns over the quality of the article published in the National Accounting

Journal based upon the journal's reputation and status. Again, the COB guidelines mandate that the peer-reviewed journal articles be "published in recognized academic or professional outlets, publicly available, and of good quality." (Appendix 3/TR 195, Exhibit 7, COB Guidelines). Therefore, Provost Wells sought out information on the journal so that she could make an independent decision on its quality and its professional reputation. (Id. at 63). Wells testified that she sought out faculty members at Eastern Kentucky University, Western Kentucky University and Kent State University to determine the significance of the journal. All three institutions she spoke with had the same conclusion: based upon their guidelines, an article published in the *National Accounting Journal* would not be sufficient to qualify towards a faculty member's application for tenure and was not of high quality. (Id. at 62-66.) For all these reasons, after a thorough review of the record, and her independent analysis[2] of Weickgenannt's scholarship, Provost Wells recommended that tenure not be awarded. (TR 195, Exhibit 14, NKU/Weick 941).

c. Weickgenannt's Internal Appeal

Pursuant to the Faculty Handbook, upon the denial of reappointment, promotion or tenure by the Provost, the faculty member may appeal the decision to the Peer Review Committees. There are two Peer Review Committees that consist of full-time tenured faculty members from across the University: the Peer Review Advisory Committee ("PRAC") and the Peer Review Hearing Committee ("PRHC"). (TR 195, Exhibit 2).

[2] Despite the fact that the Provost agreed with Dean Beehler's recommendation in this matter, it is undisputed that she performs an autonomous, substantive review of every tenure application and reaches an independent decision from that of the Dean, Chair, or RPT Committee. In fact, she has opposed the assessment of a Dean on several occasions, including most recently another member of the Department of Accountancy, Dr. Ken Ryack, whom in 2008 Dean Beehler recommended for continued reemployment, and the Provost recommended for a terminal contract. (Wells Depo., pg. 81-83)

Weickgenannt's letter to Provost Wells stated that "the bases for this appeal are my reliance upon the documented guidelines and the merits of my accomplishments in accordance with the two NKU policy books that define promotion and tenure process. As these policies and procedures delineate this process, they must be followed in order to award tenure." (Exhibit 18, January 15, 2008 appeal letter). At no point in her appeal did Weickgenannt express that the decision to deny her tenure was based on her gender. (TR 195, Exhibit 1, Plaintiff's Depo., pg. 102). It also was apparent through her appeal that what Weickgenannt truly was concerned about was that Dr. Beehler was ushering in new ways to scrutinize *all* faculty members, male and female alike, and she happened to be the first tenure candidate that was reviewed. (TR 195, Exhibit 1, Weickgenannt Depo., pg 117-118).

The first Committee to review the Appeal is the advisory committee known as "PRAC." The PRAC determined there was a prima facie case on whether the policies and procedures were followed in the tenure process, and whether the decision was made in a fair and reasonable manner. (Id. at 19-21). (See also TR 195, Exhibit 20). However, in regards to the evidence presented, Dr. Kempton, the PRAC chairperson, testified that there was nothing presented that indicated that Dr. Turner, Dr. Beehler, or Dr. Wells made their decision to deny or recommend denial of tenure of Weickgenannt based upon her gender. (TR 195, Exhibit 19, Kempton Depo., pg. 42-43). More importantly, Dr. Kempton stated that the PRAC's decision to find a prima facie case was not "based upon the fact that Ms. Weickgenannt was somehow unfairly treated because of her gender." (Id.)

After the PRAC made its findings, the Peer Review Hearing Committee scheduled a hearing in order to make a recommendation to President Votruba regarding the Prima Facie case that was submitted. On April 19, 2008, the PRHC held the hearing wherein both the University and Weickgenannt, who had an attorney present at the proceedings to serve as an advisor, were able to introduce evidence, call and question witnesses, and generally present the facts surrounding her appeal. (TR 195, Exhibit 2, NKU/Weick 539-541).

On April 29, 2008, the PRHC, chaired by Dr. Charles Frank, made its recommendation to President Votruba. (TR 195, Exhibit 21). The PRHC disagreed with the ultimate decision to not award tenure that was reached by Provost Wells but noted they were not in a position to judge the scholarship contributions of Weickgenannt, feeling "completely unable to do so", and therefore couldn't determine the meaningful changes to the article *Auditors' Self Perceived Abilities In Conducting Domain Audits.* (Id.)

Similar to Dr. Kempton, Dr. Frank emphatically testified that there was no evidence presented to the PRHC that Dr. Wells or Dr. Beehler based their decision to recommend against tenure on her gender, and the PRHC's recommendation to President Votruba was "absolutely...not" based upon the fact that Weickgenannt was somehow unfairly treated because of her gender. (TR 195, Exhibit 22, Frank Depo., pg. 104-105).

d. President Votruba's Decision

Per the handbook, the Peer Review Committee presented their recommendation and written findings to Dr. James Votruba, the University's President. (TR 195, Exhibit 2, NKU/Weick 541). President Votruba was President of Northern Kentucky University

from 1997 through 2012. Prior to becoming President of NKU, President Votruba held the position of Vice-Provost and tenured Professor of Education at Michigan State University from 1989-1997 and Dean of the School of Education from 1983-1988, and Academic Vice President from 1988-1989 at the State University of New York at Binghamton. President Votruba holds a Bachelor's degree in Political Science; a Master's degree in Interdisciplinary Social Science; and a Doctorate of Higher Education Administration. He also completed the Educational Leadership Program at Harvard University.

Upon receipt of the PRHC's recommendation, Dr. Votruba "made a thorough review of the complete transcript, documents received in evidence, written findings of fact, and decisions and recommendations in the matter of [Weickgenannt's] application for Associate Professor and tenure." (TR 195, Exhibit 23, May 20, 2008 letter from Dr. Votruba to Plaintiff). The Faculty Handbook also permits the President to formulate a recommendation to the Board of Regents by consulting "with the Provost and the Deans of the University's Colleges." (TR 195, Exhibit 2, NKU/Weick 541). Dr. Votruba did speak with both the Provost and Dean asking them to "elaborate" on their decision not to recommend tenure for Weickgenannt. (TR 195, Exhibit 6, Votruba Depo., pg. 14). However, after gaining their perspective, Dr. Votruba independently determined that Weickgenannt had not met the University's and College of Business' standards for scholarship:

> [Beehler's] statement was an important statement, but not a determinative statement. At this point it was in my hands, and I felt I was obliged to review all of the materials, both written as well as get some input. There wasn't an extensive written record on the part of the Provost or the Dean.

(TR 195, Exhibit 6, Votruba Depo., pg. 15; Exhibit 4, Votruba Affidavit, ¶7).

After determining that the RPT Committee, the Chair, the Dean, and the Provost, all followed the correct procedures in reaching their decision even though there was not unanimous agreement, Dr. Votruba made his decision to recommend to the Board of Regents that tenure not be granted to Weickgenannt based upon a substantive review of the documentation and evidence surrounding her application and her appeals. (TR 195, Exhibit 6, Votruba Depo., pg. 19, Votruba Aff. ¶7):

> Q. And why did you feel she did not meet the standard for scholarship?
> A. Well, there were, in my view, too many questions about the quality of the journals, the qualities of her contribution, and the question of -- of whether she had, by this time, six years into her appointment, developed a well-defined research agenda for herself apart from the co-authors with whom she wrote. My recollection is that Andrea was not the lead author on any of the publications, but I don't have those in front of me.

(TR 195, Exhibit 6, Votruba Depo., pg. 18-19).

Dr. Votruba had valid and sufficient concerns over the quality and the publications of Weickgenannt's articles, her contributions to those publications, and the lack of evidence of an independent scholarly trajectory. He made these conclusions based upon his personal knowledge and sense of what constitutes a level of certainty that would lend itself to a lifetime commitment. (TR 195, Exhibit 6, Votruba Depo., pg. 24-25). Weickgenannt's gender was never mentioned by Beehler or Wells and played no role in President Votruba's decision to deny tenure to Weickgenannt. (TR 195, Exhibit 4, Votruba Affidavit, ¶10).

C. Procedural Background

Weickgenannt filed the underlying lawsuit against NKU in Campbell County Circuit Court on March 20, 2009 alleging breach of contract and violations of the

Kentucky Civil Rights Act among other claims after her failed application for tenure to the University. (TR 1-10). Weickgenannt's breach of contract claim was dismissed without prejudice and re-filed in the Franklin Circuit Court[3]. (TR 72-73). Weickgenannt's claim for gender discrimination under the Kentucky Civil Rights Act was the only remaining claim pursued by Weickgenannt in Campbell Circuit Court.

1. The Order of the Campbell Circuit Court.

The Circuit Court granted the University's Motion for Summary Judgment on October 18, 2011. (Appendix A). The Circuit Court held that Weickgenannt failed to establish a *prima facie* claim of gender discrimination because she did not demonstrate that she was qualified for tenure and she had no evidence that she was treated differently than similarly situated males. The Circuit Court also held that even if Weickgenannt established a *prima facie* case, she failed to present evidence that the University's stated reason for denying her tenure was a mere pretext for discrimination. (Id.)

2. The Opinion of the Court of Appeals.

Weickgenannt appealed the Circuit Court's Order, raising several issues on appeal. On November 22, 2013, the Court of Appeals rendered its decision. First, the Court of Appeals found error with the Circuit Court's determination that Weickgenannt did not establish a *prima facie* case of discrimination. November 22, 20113 Court of Appeals Opinion (Appendix 2, "Ct. App. Opinion") at 9-10. The Court of Appeals held that the Circuit Court also erred in concluding that Weickgenannt failed to bring forth evidence to prove that the University's non-discriminatory reason for denying tenure was a pretext for unlawful discrimination. The opinion remanded the case to the Campbell

[3] The Franklin Circuit Court later dismissed the breach of contract claim on the basis of sovereign immunity and the decision was affirmed by the Court of Appeals. *See Weickgenannt v. Bd. Of Regents of N. Ky. Uni.*, No. 2011-CA-001975-MR, 2012 Ky. App. Unpub. LEXIS 980 (Dec. 21, 2012).

Circuit Court for further proceedings.

As set forth herein, the University maintains that the Court of Appeals committed error by: (1) departing from established precedent under the *McDonnell Douglas* burden-shifting framework and therefore failing to apply the correct standards regarding whether faculty members are "similarly situated"; (2) misstating the University's legitimate non-discriminatory reason for denying Weickgenannt tenure; (3) failing to utilize the proper analysis to conclude that the University's legitimate non-discriminatory reason for denying was a pretext for gender discrimination and (4) refusing to acknowledge the unique and complex decision-making process that is used in university tenure decisions.

IV. ARGUMENT

A. Standard of Review

This Court reviews the Circuit Court's grant of summary judgment *de novo* and sets aside findings of fact if they are clearly erroneous and not supported by substantial evidence. *Energy Home Div. of Southern Energy Homes, Inc. v. Peay*, 406 S.W.3d 828 (Ky. 2013). The question before this Court is whether the Circuit Court correctly applied the legal standards of CR 56 in concluding that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law and if the Court of Appeals was in error in reviewing the Circuit Court's decision and applying the *McDonnell Douglas* burden shifting test in full.

The Circuit Court correctly applied the legal standards of CR 56 in concluding that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). In *City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001), the Kentucky Supreme

Court explained that the summary judgment procedure "is intended to expedite the disposition of cases." While the moving party must present undisputed facts and legal authority supporting the entry of summary judgment, the non-moving party must do more than simply controvert the facts on which the moving party relies. Weickgenannt failed to make out a prima facie case of gender discrimination or prove that the University's legitimate non-discriminatory reason was pretext and produced no evidence that gender played a role in the decision to deny her tenure or that the decision-makers harbored any discriminatory animus toward her. Consequently, the Court must affirm the Circuit Court's grant of summary judgment in favor of Appellant and reinstate its Order.

B. The Court of Appeals Committed Reversible Error in Abandoning Well-Established Precedent Regarding the *McDonnell Douglas* Burden-Shifting Framework.

The Kentucky Court of Appeals and this Court have repeatedly held that in order to establish a *prima facie* case of discrimination and survive summary judgment, a plaintiff must show that "(1) she was a member of a protected group; (2) she was subjected to an adverse employment action; (3) she was qualified for the position; and (4) 'similarly situated' non-protected employees were treated more favorably." *Murray v. E. Ky. Univ.*, 328 S.W.3d 679, 681-682 (Ky. App. 2009) (*citing Peltier v. U.S.*, 388 F.3d 984, 987 (6th Cir. 2004); *see also Commonwealth v. Solly,* 253 S.W.3d 537, 541 (Ky. 2008); *Young v. Hammond,* 139 S.W.3d 895, 903-04 (Ky. 2004); *McBrearty v. Kentucky Cmty. & Tech. Coll. Sys.*, 262 S.W.3d 205, 214 (Ky. App. 2008).[4]

Of significance is the Courts' recognition that the fourth prong of the prima facie case is premised on the plaintiff's burden to provide evidence of a "similarly situated"

[4] Kentucky Courts have "consistently interpreted the civil rights provisions of KRS Chapter 344 consistent with the applicable federal anti-discrimination laws." *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492, 495 (Ky. 2005).

individual that had been treated differently. The "similarly situated" standard has been consistently and universally applied as the fourth prong of the *McDonnell Douglas* prima facie case in Kentucky and other jurisdictions. See *Charalambakis v. Asbury College*, 2014 Ky. App. LEXIS 16 (Ky. Ct. App. Jan. 31, 2014)(To establish a prima facie case of discrimination, "[a] plaintiff must show that: (1) he is a member of a protected class; (2) he was terminated; (3) he was qualified for the position; and (4) he was replaced by a person outside a protected class or was treated differently than a similarly situated, non-protected employee." Citing *Abdulnour v. Campbell Soup Supply Co., LLC*, 502 F.3d 496, 501 (6th Cir. 2007). Likewise, in *Ragozzine v. Youngstown*, 2014 U.S. Dist. LEXIS 22864 (E.D. Ohio Feb. 24, 2014) in reviewing a claim of race discrimination in the context of a professor's denial of tenure, the Court stated that to establish a prima facie case of discrimination the Plaintiff must have proven 1) he was a member of a protected class; 2) he was qualified for the position; 3) he suffered an adverse employment action; and (4) **that others, similar to him in all respects other than membership in the class at issue, did not suffer the same adverse action.** (Id. at *31) (emphasis added).

In 2008, this Court agreed with the long-standing interpretation of *McDonnell Douglas:*

> In cases of employment discrimination where there is no direct evidence of discrimination, the person claiming discrimination must make a prima facie showing that there has been discriminatory action toward her. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973); see also *Jefferson County v. Zaring*, 91 S.W.3d 583, 590 (Ky. 2002) (applying McDonnell Douglas to state civil rights claims); *Williams v. Wal-Mart Stores. Inc.*, 184 S.W.3d 492, 495 (Ky. 2005) (same). To do this on a claim of sex discrimination, an employee must show that she is a member of the protected class, that she was subject to an adverse employment action, that she was qualified for the position, **and that a similarly situated male was treated more favorably**.

Commonwealth v. Solly, 253 S.W.3d 537, 541 (Ky. 2008) (emphasis added). The University could continue to cite case after case that has acknowledged the fourth part of the *McDonnell Douglas* analysis is where it is appropriate to address the similarly situated comparators. Despite this clear precedent, the Court of Appeals stated that "the Circuit Court should not have conducted an inquiry into the treatment of 'similarly-situated' male employees at [the *prima facie*] stage of the analysis." (Appendix 2, Ct. App. Opinion at 10).

The Court of Appeals gave this otherwise important step a trivial assessment by stating, "[i]n their depositions, many of the university's witnesses identified male faculty members who were given tenure by the university and promoted to higher positions as Associate Professors in the few years surrounding Weickgenannt's application. This is sufficient for purposes of establishing a prima facie case of discrimination." (Id.) However, as the precedent plainly states, this is anything but sufficient. Simply having a male identified as gaining tenure without verifying they are actually "similarly situated" was not what the Supreme Court intended with *McDonnell Douglas* or this Court in *Commonwealth v. Sully.* If this were the actual standard utilized by courts, there would be no need for a *prima facie* case because there would almost certainly be another coworker outside the protected class — similarly situated or not — that had not been terminated by the employer, not been disciplined by the employer, not been hired by the employer, or promoted by the employer.

Additionally, in one of the Court of Appeals' footnotes, it cited *Kirkwood v. Courier-Journal,* 858 S.W.2d 194 (Ky. App. 1993), for the proposition that the "similarly situated" analysis occurs at the pretext stage of the analysis and not during the review of

the *prima facie* case. (Appendix 2, Ct. App. Opinion at 10, n. 3). However, the *Kirkwood* case flatly contradicts this statement by the Court of Appeals. The *Kirkwood* Court noted that "[a] *prima facie* case of discriminatory treatment based on race may be further established by showing that similarly situated individuals of another race are accorded more favorable treatment than the plaintiff." *Kirkwood,* 858 S.W.2d at 198. In fact, the *Kirkwood* case never addresses the pretext analysis but focuses exclusively on what is required to establish a *prima facie* case.

Another case cited by the Court of Appeals in supposed support of its decision provides a clear pronouncement that the "similarly situated" analysis occurs at the *prima facie* stage and not at a later time. *McBrearty v. Kentucky Cmty. & Tech. Coll. Sys.,* 262 S.W.3d 205, 214 (Ky. App. 2008) (a claim for disparate treatment requires the plaintiff to show "(1) she is a member of a protected group; (2) she was subjected to an adverse employment decision; (3) she was qualified for the position; and (4) she was replaced by a person outside the protected class, **or similarly situated non-protected employees were treated more favorably**." Emphasis added. Citing to *Peltier v. U.S.*, 388 F.3d 984, 987 (6th Cir. 2004)). Thus, even the cases cited by the Court of Appeals fail to support its serious departure from the standard *prima facie* elements a plaintiff must prove to be successful in a disparate treatment case. This clear Kentucky precedent was incorrectly interpreted by the Court of Appeals.

1. Weickgenannt Failed to Establish a Prima Facie Case of Discrimination Since She Did Not Produce Evidence that Similarly Situated Comparators Were Treated Differently

Once the proper burden shifting analysis is utilized by the Court, the facts undoubtedly show that the Circuit Court properly found that Weickgenannt failed to

establish a prima facie case of discrimination because she did not produce evidence that similarly situated males were treated differently. The Circuit Court determined that Weickgenannt had established the first and second prong of a prima facie case as she was a member of a protected class and suffered an adverse employment action. (Appendix 1/TR 362, Cir. Ct. Order at 11). The Circuit Court only took issue with the third and fourth prongs: if Weickgenannt was qualified and if she was treated differently than a similarly situated male. (Id.) For purposes of this appeal, the University is only addressing the fourth prong of the test.

a. Determining What Comparators Are Similarly-Situated To Weickgenannt.

In order to satisfy the "similarly situated" element, Weickgenannt must have established that she and the identified individual with whom she should be compared were "similarly-situated in all relevant aspects." *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998). The standard for being considered "similarly situated" was reiterated in a recent case:

> [I]n order for a plaintiff to demonstrate that a non-protected employee is 'similarly situated', [s]he must 'prove that all of the relevant aspects of [her] employment situation were 'nearly identical' to those of [the non-protected employee's] employment situation.' Furthermore, in order to be deemed similarly situated, 'the individuals with whom the plaintiff seeks to compare [her] treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct.

Berryman v. SuperValu Holdings, Inc., 2010 U.S. Dist. LEXIS 32522, *33 (S.D. Ohio March 31, 2010) (citations omitted) (emphasis added). Weickgenannt is required to show that "all of the relevant aspects of [her] employment situation are "nearly identical" to those of the [male] employees who [s]he alleges were treated more favorably." *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir. 1994) (citations omitted).

Noting the extent that scholarship is defined in the handbooks and guidelines, nearly identical involves much more than if individuals have the same number of articles.

Typically this standard is met if the comparators were located in the same department as the plaintiff. *See Sommerfield v. City of Chicago*, 613 F. Supp. 2d 1004, 1015-1020 (N.D. Ill. 2008); *Taylor v. Georgia Pacific LLC,* 2008 U.S. Dist. LEXIS 25766, *19 (W.D. Ark. March 31, 2008). "A denial of tenure by an English department simply cannot be compared with a grant of tenure in the physics or history departments." *Zahorik v. Cornell University*, 729 F.2d 85, 93 (2d Cir. 1984). "[S]ince Plaintiff was the only candidate for tenure from his department in 2007, any comparison to tenure candidates in other departments . . . would not be meaningful." *Rajaravivarma v. Bd. of Trs. For the Conn. State Univ. Sys.*, 862 F. Supp. 2d 127, 162 (D. Conn. 2012). More applicable, Courts that have reviewed similarly-situated comparators in the denial of tenure context have determined that proper comparators are those that have been judged by the same criteria as the plaintiff. See *Dr. Soo-Siang Liam v. The Trustees of Indiana University and Dr. David Burr*, 297 F.3d 575, 581 (7th Cir. 2002); *Demuren et. al. v. Old Dominion Univ.*, 33 F. Supp. 2d 469, 481 (E.D. Va. 1999).

Additionally, to be a proper comparator, the individual must have appealed the tenure decision to Dr. Votruba. The President's role when examining an appeal from the PRHC is distinctly different from his role when reviewing a positive recommendation from the Provost. Unless there is an appeal of the Provost's decision, the President does not receive the portfolios to read. (TR 195, Exhibit 3, Wells Depo., pg. 82-83). Dr. Votruba had never before been called upon to make a substantive review of a tenure application through an appeal made to the Peer Review Committee Hearing.

Weickgenannt's appeal is the first to have gone through this process. (TR 195, Exhibit 6, Votruba Depo., pg. 19). This fact alone shows that there are no other similarly situated comparators to Weickgenannt for there has not been another applicant for tenure who has appealed the Provost's decision through the Peer Review Hearing Committee to the University President for a substantive review of the applicant's portfolio.

Based on these guidelines, the Circuit Court correctly found that a proper "comparator male would have been from the same department, a candidate for tenure, judged by the same criteria and reviewed by the same individuals who Ms. Weickgenannt claims treated her unfavorably because she was a female, i.e. Chair Turner, Dean Beehler, Provost Wells, and President Votruba."

Instead, the Court of Appeals created its own more expansive definition of whom could be similarly situated (occurring erroneously in the pretext stage & ignoring the "in all relevant respects language"). The very limited discussion the Court of Appeals had regarding how to interpret a similarly situated comparator found that "similarly situated male faculty members includes those who were subject to the same standards as Weickgenannt, had presented similar evidence of scholarly activity, and had been given tenure in accordance with NKU's established procedures...the proper cohort includes the tenure candidates in the College of Business." (Appendix 2, Ct. App. Opinion at 12-13). While the University believes the Circuit Court correctly determined where to look for a comparator, for purposes of this appeal, if the Court of Appeals' standard were used, Weickgenannt's evidence still did not support its conclusion that she was treated differently than a similarly situated male within the College of Business.

Principally, the Court failed to determine if a comparator had actually presented "similar evidence of scholarly activity" or that the individuals were "nearly identical" in all respects. See *Berryman* at *33. Instead the Court of Appeals, without any in-depth evaluation or assessment, found one individual, Richard Gilson, was similarly situated only because his "application materials evinced only three scholarly articles published in peer-reviewed journals, and all were co-authored." (Appendix 2, Ct. App. Opinion at 13.) This short-sided review failed to place any significance on the quality and trajectory of scholarship that is also so vital to a grant of tenure and required by the handbook.

What is considered "nearly identical" for purposes of a comparator has been determined to be much more expansive than what the Court of Appeals applied under the circumstances. *Nathan v. Ohio State Univ.*, 2014 U.S. App. LEXIS 16357 (6th Cir. 2014) is illustrative of this point. The plaintiff in *Nathan* did not look at his alleged comparators in light of their whole record and the court found this was too limiting:

> Dr. Nathan has simply not identified any comparator, similarly situated in all relevant respects and engaged in acts of comparable seriousness, who was retained. See *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 710 (6th Cir. 2006)...The question is not whether other employees also performed poorly in one or two areas, but whether taken altogether they performed equally as poorly as Dr. Nathan and whether her conduct as a whole justified her dismissal. As the district court properly noted, none of the other doctors who were retained match Dr. Nathan for the variety and severity of her misconduct, and those that did were dismissed.

(Id. at 4-5). "Conduct as a whole" in regards to scholarship must encompasses all three categories to be nearly identical when comparing Weickgenannt and other individuals. See also *EEOC v. Muhlenberg College*, 2004 U.S. Dist. LEXIS 8434, *16-17 (E.D. Penn. April 29, 2004) ("The point which the court emphasized in *Bennun* is that the professors were comparable because they were both biochemistry professors in the Zoology and

Physiology Department. *(Id.)* This was enough, the court found, to enable it to evaluate whether the objectives criteria had been evenly applied. In the instant case, none of the professors relied on for comparison were even in the same department as Dr. Pan.").

Again faced with clear precedent in this area, the Court of Appeals failed to properly determine what made an individual "similar in all respects." As expressed in *Nathan,* it failed to look at Weickgenannt's total conduct or scholarship contributions compared to other males, including the quality and quantity of their scholarship, their ability to be a major contributing author and commit to a trajectory of scholarship. If the Court of Appeals were to properly assess "similar evidence of scholarly activity" it should have incorporated the entire scholarship framework used at the University and by its assessors.

There are multiple reasons why denial of tenure cases make it difficult to establish proper comparators: (1) tenure contracts entail commitments as to the length of time and collegial relationships which are unusual, (2) such decisions are often non-competitive, (3) decisions are usually highly decentralized (4) the number of factors considered in tenure decisions is quite extensive, and (5) tenure decisions are a source of unusually great disagreement. *Zahorik,* 729 F.2d at 92-93. As the Circuit Court noted, the same difficulties arise in attempting to compare Weickgenannt's application for tenure to that of anyone "outside the Department of Accountancy, who were not reviewed for promotion and tenure in the fall of 2007, and who did not come before the same Chair, the same Dean, the same Provost, and the same President." (TR 374).

The many different factors that account for how the University ultimately reached the decision to deny tenure cannot accurately be compared to another faculty member

unless he or she is "identical" in nearly every respect. This is particularly important due to the subjective nature of the decisions being made by the University on issues concerning scholarship, and the possibility of future contributions from the applicant which widely varies among faculty members even within the same department. A faculty member's scholarship may be reflected in many different ways, such as the "reputation of the publication/presentation outlet, the citations or reviews of the work in other publications, and its influence on the discipline or some community of people." (TR 195, Exhibit 2, Weickgenannt Depo., pg. 477).

In Weickgenannt's case, the Provost and thereafter the President, relying upon their own substantive reviews of the record, determined that Weickgenannt should not be granted tenure because one of her three referred journals was not of sufficient quality, and she was not a major contributing author to one of the other articles. "The university is entitled to decide what journals are considered sufficient quality to count as refereed journals." *Waggaman v. Villanova,* No. 04-4447, 2008 U.S. Dist. LEXIS 67245, *37-38 (D.C. Sept. 4, 2008).

The Provost's decision in not recommending tenure was primarily based on separate and distinct reasons from those of Dean Beehler. Dean Beehler, as a highly distinguished accounting professor, used his background and education to determine the quality standards of Weickgenannt's articles and journals to see if she met the University's and COB's criteria for tenure. Similarly, President Votruba did a substantive review of Weickgenannt's appeal and concluded that there was sufficient doubt in the area of her scholarship to grant tenure. All three also recognized that she did not have the necessary background to demonstrate a continued trajectory. Weickgenannt has made no

argument in this case that her scholarly work shows such a trajectory or that any of the similarly-situated males she identifies had similarly dismal prospects for future scholarship and yet were granted tenure. These undisputed, independent steps, all thorough and systematic, taken by the Dean, Provost and President are evidence of that gender animus was not present in their decisions and illustrative of the importance the entire scholarship portfolio is in a similarly situated analysis.

A separate and distinct reason courts have limited the use of comparators in a denial of tenure claim is due to the inability to compare scholarship in deference to the University's academic freedom and the difficulty comparing scholarship brings: "Title VII does not require that the candidate whom a court considers most qualified for a particular position be awarded that position; it requires only that the decision among candidates not be discriminatory . . . Indeed, to infer discrimination from a comparison among [tenure] candidates is to risk a serious infringement of first amendment values." *Lieberman v. Gant*, 630 F.2d 60, 67 (2d Cir. 1980). See also *Caine v. Trinity College*, 791 A.2d 518, 537 (Conn. 2002) (applying McDonnell Douglas Title VII analysis when considering discrimination claim) (The principle of academic deference guides our view of comparison evidence because the principle that a school may choose its own faculty for any nondiscriminatory reason is never more in jeopardy than when a plaintiff puts before the jury evidence that two individuals with similar credentials were considered for tenure, and one was denied it. . . . Comparison evidence tempts fact finders to provide redress to candidates who seem to deserve tenure and whose denial is not easily or honestly explained, even where there is no evidence that the denial was motivated by discrimination.)

For all of the reasons cited above, the Appellate Court's decision to restrict the definition of a comparator was in error and their decision should be reversed.

b. Weickgenannt's Alleged Comparator Is Not Similar In All Relevant Aspects

Appellee had originally identified four male faculty members that she believed were similarly situated to her. However, the Court of Appeals determined that Weickgenannt waived the right to discuss any other comparator other than Richard Gilson in the similarly situated analysis. (Appendix 2, Ct. App. Opinion at 13 fn. 5.) An examination of Richard Gilson's tenure application is instructive of as to why the Circuit Court rejected Weickgenannt's position and why the Court of Appeals analysis was in error.

Weickgenannt alleges Mr. Gilson was treated more favorably than her in regards to his positive recommendation for tenure. (TR 195, Exhibit 1, Weickgenannt Depo., pg. 79). Dr. Gilson, who unlike Weickgenannt has his Ph.D., is a member of the Department of Marketing and Management who applied for tenure in September 2006, a year prior to Weickgenannt's application. (TR 195, Gilson Depo, pg. 11). Dr. Gilson was reviewed by a different RPT Committee and different Department Chair. Weickgenannt contends that similar to her, Dr. Gilson only had three peer-reviewed journal articles but was still awarded tenure. (TR 195, Exhibit 2, Weickgenannt Depo., pg. 82, 115-116). Weickgenannt's Appeal classified Gilson as an appropriate comparator due to his scholarship contributions:

> ...Gilson is a particularly close comparator because he applied for tenure the year before Weickgenannt, was a colleague in the same college under the same tenure guidelines, was evaluated by the same ultimate decision-maker (Provost Wells), and presented a very similar but less impressive, portfolio with all of the same features considered as negatives in Weickgenannt's portfolio.

(Emphasis added) (Appellant's Brief at 17). However, Weickgenannt provided no evidence as to the quality of Gilson's articles or how the substance of his articles was judged by his RPT committee, the Department Chair, the Dean, or the Provost. (TR 195, Exhibit 2, Weickgenannt Depo., pg. 82-83, 115-116). Additionally, Dr. Gilson did not receive "conditions to be removed" in two separate years regarding the inadequacy of his scholarship as did Weickgenannt. Since Weickgenannt wants the court to *compare* the scholarship of Gilson and herself, she has the burden to produce how it was "less impressive" or had the "same features" as she alleges. And, if she was able to produce it, the Appellate Court certainly should have made such a comparison at that level.

Dr. Gilson's award of tenure fails to show that Weickgenannt was treated differently. As stated by Dr. Gilson's RPT committee chairman, Fred Beasley, "Gilson still had three *quality* journal articles." (TR 195, Gilson Depo., pg. 57). Even if Weickgenannt and Dr. Gilson were similarly situated in all respects, Weickgenannt would have to demonstrate how her fundamentally different accounting articles compared in terms of quality to Dr. Gilson's management and marketing articles. This analysis would have to include comparing Weickgenannt and Gilson's contribution to the articles, the journal's significance, the quality of the writing, the contribution it made to the profession, etc. And, that is if all other relevant aspects of their application and employment were nearly identical (*i.e.*, showing that Gilson was not a "major contributing author" to one of his submitted articles). The above demonstrates Gilson was not a comparator under the law. Larison cannot meet his threshold requirement because, other than his own speculation, he has no evidence that younger professors were not held to the same standards for tenure.

C. The Court of Appeals Erred in Stating the University's Actual Non-Discriminatory Reason for Denying Tenure.

In the burden-shifting analysis, once a plaintiff establishes a *prima facie* case of gender discrimination, the burden shifts to the employer to articulate legitimate, nondiscriminatory reasons for its decisions. *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492 (Ky. 2005). The employer need only present a legitimate, nondiscriminatory reason for taking the action. *Hartsel v. Keys*, 87 F.3d 795, 800 (6th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997).

The Circuit Court determined the University articulated a legitimate non-discriminatory reason to deny Weickgenannt tenure — her insufficient scholarship based upon its subjective analysis of the tenure criteria found in the Faculty Handbook and COB Guidelines. (Appendix 1/TR 362, Cir. Ct. Order at 14). Deficient scholarship is a legitimate nondiscriminatory reason to deny tenure. See *Waggaman v. Villanova*, No. 04-4447, 2008 WL 4091015 (E.D. Pa. Sept. 4, 2008) and *Langland v. Vanderbilt University*, 772 F.2d 907 (6th Cir. 1985). As discussed above, the COB's tenure criteria in regards to scholarship includes three distinct categories, each of which were encompassed and contemplated in the Circuit Court's decision to find the University had a legitimate non-discriminatory reason to deny tenure:

1. All works should be refereed, published in recognized academic or professional outlets, publicly available, and of *good quality*.

2. *A major contributing author* of at least three journal articles.

3. *Indication of continuing scholarship* and active scholar status beyond the awarding of tenure and promotion.

(Appendix 3). Therefore the University has a legitimate reason to deny tenure to any individual who lacked quality scholarship, was not a major contributing author or failed

to indicate a trajectory of scholarship. All three were evident with Weickgenannt's scholarship and the testimony supported such a finding. Over the multiple years of review, each level commented at least twice and cautioned Weickgenannt on her lack of scholarship and imposed "conditions to be removed." There is no dispute that Weickgenannt's application for tenure only had three peer-reviewed journals listed, one of which was adjudged to not be sufficient enough to meet the standards of "major contributing author" and one of which was published in a poor quality journal. Furthermore, Provost Wells also determined that Weickgenannt had not sufficiently met the guidelines of the Faculty Handbook or the COB Guidelines where the faculty member must demonstrate an "indication of continuing scholarship and active scholar status beyond the awarding of tenure and promotion." Without being a major contributing author to three peer-reviewed journal articles of good quality, and evidence of a trajectory of scholarship, Weickgenannt cannot even meet the minimum standard necessary for tenure through the College of Business established guidelines.

The Court of Appeals agreed that the University supplied a non-discriminatory reason to deny Weickgenannt tenure and stated "[t]he Dean and the Provost reported that they had closely examined the scholarly works submitted, and found them lacking." (Appendix 2, Ct. App. Opinion at 12.) However, the Court of Appeals failed to recognize that Weickgenannt was not denied tenure simply because she co-authored articles, but rather because she failed to substantively contribute to at least one article she co-authored and another of her articles was published in a journal of low quality. Thus, the reasons stated by the University for denying tenure to Weickgenannt were both the number *and*

quality of the journal articles she published as well as her failure to demonstrate a solid trajectory for future scholarship.

The Court of Appeals' failure to recognize the importance of quality, quantity, and trajectory is crucial in this case because, as it later pointed out and relied heavily upon, Dr. Richard Gilson also only submitted three scholarly, co-authored articles just one year before Weickgenannt applied for tenure and was still granted tenure. (Appendix 2, Ct. App Opinion at 13.) The Court of Appeals further states in its Opinion that the non-discriminatory reason proffered by the University was only due to Weickgenannt's submissions of three co-authored articles, thus, making her similarly situated to Dr. Gilson. (Id.) The Circuit Court did no examination of evidence showing Dr. Gilson' contribution to his articles, the quality of journals they were submitted to, or what scholarship he was already in the process of writing that showed a trajectory of scholarly work — all which are part of the College of Business undisputed standards. It is also undisputed that each of the assessors included all three of those standards in their decision on her tenure application. Even if they had tried, the Circuit Court could not do this examination because Weickgenannt failed to include such information in the record in regards to her comparators. She failed to ultimately provide any support that the University treated her differently when properly assessing all of the scholarship guidelines used by the University. (TR 195, Exhibit 2, Weickgenannt Depo., pg. 83, 115-116).

D. No Reasonable Juror Could Conclude That The University's Non-Discriminatory Reason for Denying Tenure was a Pretext for Gender Discrimination

There was no dispute that the University met its burden of stating a non-discriminatory reason for termination.[5] Therefore, under *McDonnell Douglas,* even if Weickgenannt successfully established a prima facie case, summary judgment would still have been appropriate unless Weickgenannt could provide evidence that the University's reason for denying tenure was a pretext for gender discrimination. Once the University has produced a legitimate, non-discriminatory reason for its action," the presumption [of discrimination] raised by the prima facie case is rebutted and drops from the case." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, 101 S. Ct. 1089 (1981). The burden then shifts back to Weickgenannt, who must demonstrate that the legitimate, non-discriminatory reason articulated by the University was not the true reason for the employment decision, but was rather a pretext to hide unlawful discrimination. (*Id.* at 256). The ultimate burden of persuasion "remains at all times with [Weickgenannt]." *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000).

The Court of Appeals agreed that the burden shifted to Weickgenannt after the University met its threshold obligation, but came woefully short in explaining what that burden was. In order to demonstrate that the University's stated reason for denying tenure is merely a pretext for unlawful discrimination, Weickgenannt is required to introduce evidence showing the proffered reason: (1) had no basis in fact; (2) was not the actual reason; or (3) was insufficient to motivate the adverse employment action. *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994); *Lewis v. Intec*

[5] In fact, Weickgenannt did not dispute the University had provided a legitimate non-discriminatory reason in response to the University's Motion for Summary Judgment with the Circuit Court.

Janitorial Contr. & Supplier, No. 2005-CA-000447-MR, 2006 Ky. App. Unpub. LEXIS 653. No such evidence was introduced before the Circuit Court and the Court of Appeals did not address this required aspect of the pretext analysis in its Opinion.

Furthermore, "[i]n challenging an employer's action, an employee 'must demonstrate that the employer's reasons (each of them, if the reasons independently caused [the] employer to take the action it did) are not true.'" *Smith v. Chrysler Corp.*, 155 F.3d 799, 805-06 (6th Cir. 1998) (*quoting Kariotis v. Navistar Int'l Transp. Corp..*, 131 F.3d 672, 676 (7th Cir. 1997)). The United States Supreme Court stated in *Reeves* that "an employer would be entitled to judgment as a matter of law if the record conclusively revealed some ... non-discriminatory reason for the employer's decision." *Reeves*, 120 S. Ct. at 2109. Therefore at this state, Weickgenannt must present "affirmative evidence," *Anderson v. Liberty Lobby*, 477 U.S. 242, 257, 106 S. Ct. 2505, 2514 (1986), that "the proffered reason was not the true reason for the employment decision and that his [race] was." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507, 113 S. Ct. 2742, 2747 (1993). She must affirmatively prove pretext. In sum, "a reason cannot be proved to be a pretext for discrimination' unless it is shown both that the reason was false and the discrimination was the real reason." (emphasis added). *St. Mary's*, 509 U.S. 502 (1993). A plaintiff may not simply deny the employer's reasons for its actions or present "conclusory allegations and subjective beliefs that an action was taken solely because of gender." See generally, *Mitchell v Toledo Hosp.*, 964 F.2d 577, 585 (6th Cir. 1992). Where, as here, an employee's challenge to the legitimacy of the employer's actions is not based on factual evidence, only speculation, the employee's claim is insufficient as a matter of law to create any issue of pretext. See, e.g., *Woythal v. Text-*

Tenn Corp., 112 F.3d 243, 247 (6th Cir. 1997) ("mere personal belief, conjecture and speculation are insufficient to support an inference of ... discrimination"). Weickgenannt did not meet her burden in this regard and the Circuit Court correctly determined that "[Weickgenannt] cannot show that NKU's reason for terminated her had no basis in fact." (Appendix 1/TR 362, Cir. Ct. Order at 14.)

Instead of reviewing the evidence under the clear legal standards, the Court of Appeals only conducted a brief analysis of whether there was a male employee applying for tenure with three articles. (Appendix 2, Ct. App. Opinion at 12.) As discussed above, the similarly situated analysis should take place during the review of the *prima facie* case. Even if comparators are considered at this stage of the analysis, the Court of Appeals failed to properly examine whether Weickgenannt and the alleged comparators are similarly situated in "all relevant aspects." *Murray v. E. Ky. Univ.*, 328 S.W.3d 679, 682 (Ky. App. 2009). If the Court of Appeals had properly evaluated the evidence in the record as the Circuit Court did, it would have ruled in favor of the University.

There is no evidence in this case which indicates a reason other than the stated one — Weickgenannt's failure to attain sufficient scholarship necessary to justify a lifetime position at the university — motivated the decision not to promote her to and give her tenure. There clearly is a basis in fact for the proffered reason because of the issues with the articles submitted by Weickgenannt. The University's reason is sufficient to justify the action it took because scholarship is a main focus of the tenure decision. Based upon the Provost and President's independent review of the Weickgenannt's portfolio, Weickgenannt would also have to demonstrate that the each of the reasons stated by the decision makers is not true. She has no evidence to demonstrate the

President and Provost were not being truthful in their analysis of her record. (TR 195, Exhibits 4 and 5, Votruba and Wells Affidavits).

In a recent case with strikingly similar facts, the Sixth Circuit correctly and thoroughly analyzed pretext within a claim of race discrimination after the Plaintiff had been denied tenure. See *Thrash v. Miami University,* 549 Fed. Appx. 511 (6th Cir. March 10, 2014). Similar to Weickgenannt, the professor in *Thrash* was attempting to prove pre-text by contending his scholarship was in fact worthy of a tenure track position and that he was treated differently than similarly situated individuals outside his class amongst other reasons. In regards to the quality of his work Dr. Marvin Thrash, like Weickgenannt has argued, asked the Court to compare his scholarship to that of his colleagues to establish his scholarship was of sufficiently high quality to grant tenure and therefore demonstrate pretext. The Sixth Circuit's decision encompasses how such a comparison cannot be used to support pretext:

> Finally, Dr. Thrash attempts to show pretext by arguing that there was substantial evidence in the record that Dr. Thrash's scholarship was of sufficiently high quality to warrant a grant of tenure. We approach this argument cautiously, with an awareness that it is not the function of the courts to sit as 'super-tenure' committees. To the extent that, as here, a Weickgenannt's pretext argument would require courts to perform a substantive evaluation of his or her academic record, the courts face a significant challenge. We are neither engineers nor scientists, and as such are ill-suited to evaluate the quality of Dr. Thrash's work ourselves. To that end, this court has previously noted that tenure decisions in an academic setting involve a combination of factors which tend to set them apart from employment decisions generally. Precisely for this reason, courts tend to hold that, although academic tenure decisions are certainly not . . . exempt from judicial scrutiny under Title VII, they are generally entitled to more deference than employment decisions in other settings.
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> In short, there was evidence on the record which calls into doubt whether Dr. Thrash's work was of sufficiently high quality to warrant tenure. Dr. Thrash's evidence of pretext as to the quality of his scholarship was not of such strength

> and quality as to permit a reasonable finding that the denial of tenure was obviously unsupported. On the contrary, the University's judgment on the issue of the quality of Dr. Thrash's scholarship was reasonable and supported by evidence. Under these facts and circumstances, we conclude that Dr. Thrash has not carried his burden of demonstrating that the University's tenure decision was pretextual.

Thrash at *521 (internal citations and quotations omitted). The University too had a multitude of unchallenged evidence that called Weickgenannt's work was of sufficient high quality. The Sixth Circuit also observes in *Thrash* the large body of case law in this area, noting that the "Eighth Circuit has held that 'in the tenure context...the plaintiff's evidence of pretext must be such strength and quality as to permit a reasonable finding that the denial of tenure was obviously unsupported'". *(Id.).* citing to *Kobrin v. Univ. of Minnesota,* 121 F.3d 408, 414 (8th Cir. 1997); *Kumar v. Bd. Of Tr., Univ. of Massachusetts,* 774 F.2d 1, 12 (1st Cir. 1985) ("Courts have no license to resolve [tenure] disputes except where this is evidence from which to conclude that an illicit motive was at work."); *and Zahorik v. Cornell Univ.,* 729 F.2d 85, 93 (2d Cir. 1984) ("Courts....are understandably reluctant to review the merits of a tenure decision.").

The Court of Appeals took none of this into consideration and erred by merely concluding that Weickgenannt need only present evidence of one male with the same number of articles that was granted tenure to overcome her burden at the pretext stage. It is very apparent that the Court in *Thrash* looked at more whether one individual was granted tenure or not to meet the pretext threshold. The Court fully analyzed numerous differences the candidates seemingly had in regards to their tenure application and still determined any such differences in treatment failed to prove pretext even though one was granted tenure and Dr. Thrash was not.

Finally, Weickgenannt has failed in her "ultimate burden" to prove "that the University intentionally discriminated against the plaintiff." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). "[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 515 (1993) (emphasis in original). The Court of Appeals Opinion cites to no evidence, whether direct or circumstantial, that could establish that Weickgenannt was not granted tenure based on her gender. Without evidence of discriminatory animus, Weickgenannt cannot survive summary judgment and the decision of the Circuit Court should be affirmed.

E. The Complex, Multi-Layered Decision-Making Process Used to Determine Whether a Candidate is Entitled to Tenure at a Public University is Entitled to Greater Deference From Kentucky Courts.

It is particularly significant that Weickgenannt's gender discrimination case be considered in the proper context: a decision to deny an individual tenure at a university where it is necessary to subjectively assess an individual's scholarship contributions. As already discussed in the previous section, this is an important element to consider. In its Opinion, the Court of Appeals completely failed to address the line of cases cited by the University which hold that tenure decisions are different than those in other employment discrimination cases.

Because this case involves the University's decision to deny Weickgenannt lifetime tenure, it is important to note the differences between the tenure process and typical employment decisions in private businesses. "Tenure decisions in an academic setting involve a combination of factors which tend to set them apart from employment decisions generally." *Zahorik v. Cornell University*, 729 F.2d 85, 92 (2d Cir. 1984).

These factors include the lifetime nature of such contracts and the multiplicity of factors relevant to the decision. *(Id.)*. Courts have long recognized the significance of allowing a university to determine the quality of scholarship and teaching it believes is necessary to grant tenure and academic and the implication of having multiple decision makers in such a process.

1. Courts Are Not In a Place to Sit As a "Super Tenure" Committee Nor Are They In a Position to Judge the Quality of Scholarship Presented.

Given that the tenure decision could grant lifetime employment to the candidate, the University places the burden on the candidate to demonstrate that they have the capacity and have established a record that shows they have the capacity to sustain a lifetime of excellence in teaching, scholarship and service. (Appendix 1/TR 362, Cir. Ct. Order at 4, n.6). Because these decisions are so vastly different from traditional employment decisions, courts avoid sitting as "super tenure" committees and adjudging the quality of a plaintiff's scholarship compared to other candidates:

> ...in cases claiming a denial of tenure because of discrimination, for a plaintiff to succeed...the evidence as a whole must show more than a denial of tenure in the context of disagreement about the scholarly merits of the candidate's academic work, the candidate's teaching abilities or the academic needs of the department or university...

Evans v. Cleveland State University, No. 90-3759, 1991 U.S. App. LEXIS 12218, *7 (6th Cir. June 3, 1991) (citing to *Zahorik,* 729 F.2d at 94). Thus, Weickgenannt is required to show more than a mere disagreement about her qualifications for tenure. She must present evidence of something more, such as discriminatory animus, to overcome summary judgment. *See Zahorik,* 729 F.2d at 93; *Straub v. Proctor Hospital*, 131 S. Ct. 1186, 2011 U.S. LEXIS 1900. However, Weickgenannt's entire *prima facie* case rests

almost exclusively on one theory: that one of the three peer reviewed journal articles Dean Beehler believed not to be of high quality was actually of higher quality than he determined, or was judged differently than other tenure applicants articles, and therefore, his decision was somehow premised on gender animus versus a simple disagreement with Appellee's opinion of her scholarship.

Weickgenannt failed to present evidence of discriminatory animus and the Circuit Court properly found "no evidence from which a jury could conclude that a reason other than the stated one – Weickgenannt's failure to attain sufficient scholarship – motivated the decision not to give her tenure." (Appendix 1/TR 362, Cir. Ct. Order at 15.)

In *Doucet v. Univ. of Cincinnati,* 2006 U.S. Dist. Lexis 49022 (S.D. Ohio July 19, 2006), the Court granted the University of Cincinnati summary judgment in a Title VII discrimination claim where the plaintiff alleged she was unlawfully denied tenure on account of her national origin. In that matter, the Court noted that a "reasonable jury construing the facts above could only conclude that -- whatever subjectivity existed in the application of the secondary research, service, and professional criteria -- UC legitimately distinguished between [the alleged comparators] on the basis of the primary and threshold RPT criterion of demonstrated teaching effectiveness." (*Id.*). at *59. In the Sixth Circuit's decision upholding summary judgment, it found that it is not the role of Courts to second guess an academic institution's judgment. A court should not "sit as a super-tenure committee, substituting its judgment for that of [the University] as to whether [the plaintiff] should have been reappointed." *Doucet v. Univ. of Cincinnati,* 2007 U.S. App. Lexis 21570, *14 (6th Cir. August 27, 2007).

Despite this significant authority from the federal courts, the Court of Appeals ruled that this case should be sent to a jury to evaluate whether gender discrimination took place. Under the Court of Appeals analysis, a jury would be forced to sit as a super-tenure committee and examine the tenure applications of Weickgenannt, Gilson, and possibly other male faculty to determine whether Weickgenannt is entitled to tenure. This is exactly what courts have repeatedly concluded should not be the function of the court or the jury in a denial tenure context.

The Circuit Court correctly addressed the extraordinary nature of a tenure decision when it found that it would need to sit as a "super tenure committee" "substituting its judgment for that of several decision-makers, and determine Ms. Weickgenannt's scholarship was quality work in a quality journal and sufficient to meet the established guidelines." (Appendix 1/TR 362, Cir. Ct. Order at 15). The trial recognized that the applicable case law overwhelmingly supported this approach to the review of employment actions in a denial of tenure matter.

Based upon the case law, Weickgenannt had a significantly higher burden to meet to overcome the University's Motion for Summary Judgment, particularly since the evidence she has relied upon is alleging, at best, a *disagreement about the scholarly merits of her academic work.* As her appellate brief noted, Dr. Gilson's scholarship was "less impressive" than her scholarship. Appellant's Brief at 17. This disagreement, cannot be evidence of gender discrimination, and was not sufficient to overcome Summary Judgment. Ultimately, there simply was no evidence in the record that creates a genuine issue of material fact as to the single claim of gender discrimination against NKU.

2. The Multiple Layers of Independent Review Also Supports the Finding of No Discriminatory Animus by The Ultimate Decision Makers.

An additional consideration which makes the tenure review process unique compared to other employment decision is the independent investigations completed by multiple decision-makers. The record indicates that Weickgenannt focuses on the possibility that Dean Beehler, and only Dean Beehler, hypothetically might have treated males more favorably than her by deciding her scholarship did not meet the University's criteria for tenure. (TR. "F", Plaintiff's Response to Defendant's Motion for Summary Judgment, pg. 28-34). At no point does Plaintiff produce evidence or even allege that Provost Wells or President Votruba treated males more favorably than Plaintiff. Therefore, for Plaintiff's argument to be successful, she not only needs to meet the elements of a prima facie case of gender animus leading to gender discrimination through her exclusive argument that similarly situated comparables were treated more favorably, but she also then must show gender animus in Provost Wells and President Votruba's decision to deny Plaintiff tenure, apart from Dean Beehler's recommendation. Votruba was clear that he independently reviewed the application:

> [Beehler's] statement was an important statement, but not a determinative statement. At this point it was in my hands, and I felt I was obliged to review all of the materials, both written as well as get some input. There wasn't an extensive written record on the part of the Provost or the Dean. (TR 195, Exhibit 4, Votruba Depo., pg. 15, Votruba Affidavit, ¶ 7),

This independent review process, unique to a university's tenure application process, it more verification that a discriminatory motive or treatment is difficult to establish.

> We accept that a dean's recommendation has significant influence on the tenure process. However because tenure decisions typically involve "numerous layers of review" by "independent and University-wide committees," the causal connection

> between any possible discriminatory motive of a subordinate participant in the tenure process and the ultimate tenure decision is weak or nonexistent. *Reyes v. St. Xavier University,* 500 F.3d 662, 667 (7th. Cir. 2007) (attached as Exhibit 1) citing to *Yong-Qian Sun v. Board of Trustees,* 473 F.3d 799, 813 (7th. Cir. 2007).
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> Accordingly, "in the absence of clear discrimination," we are generally "reluctant to review the merits of tenure decisions," recognizing that "scholars are in the best position to make the highly subjective judgments related [to] review of scholarship and university service." *Reyes* at 667, citing to *Farrell v. Butler Univ.,* 421 F.3d 609, 613 (7th. Cir. 2005).

Without more, Weickgenannt cannot overcome the significance placed by courts on the multiple levels of independent review in denial of tenure cases and which also occurred in her review process. Precedent provides that any causal connection between Dr. Turner or Dean Beehler's allegedly discriminatory motive and Dr. Votruba's ultimate decision, is weak or nonexistent.

Although Weickgenannt may attempt to show that Provost Wells and President Votruba did not perform an independent review because they each considered Dean Beehler or Dr. Turner's recommendations, that is not enough to impute liability of their alleged animus. In *Rajaravivarma v. Board of Trustees for Connecticut State Univ. Sys.*, 862 F. Supp. 127, 150 (D. Conn. 2012), the Court addressed the plaintiff's burden in similar circumstances.

> It is undisputed that President Miller read and reviewed Dr. Zanella and Dr. Tracey's negative recommendations as part of his decision making process. However, without more, the fact that President Miller read their recommendations and also concluded that [Plaintiff] had deficiencies in load credit and creative activity is not sufficient to demonstrate that a direct relation exists between their negative recommendations and President Miller's ultimate decision. *(Id.)*. at 77.

Therefore, the Circuit Court correctly concluded, that Weickgenannt provided no evidence to contradict NKU's assertion and the overwhelming testimony that Provost

Wells and President Votruba made their decision independent of Dean Beehler and Dr. Turner and that was sufficient enough to warrant summary judgment.

Additionally, in *Blasdel v. Northwestern Univ.*, 687 F.3d 813 (7th Cir. 2012), Judge Posner, writing for the Seventh Circuit, recognized the difficultly in proving discrimination in a denial of tenure situation, and relied upon numerous other cases that acknowledge the academic freedom a University has in making a decision to offer a lifetime position to an employee:

> Granting tenure, like appointing a federal judge, is a big commitment. The final decision may be made by a committee, or an official such as a university provost or president, remote from the chairman and the other members of a candidate's department. Even if invidious considerations play a role in the department's recommendation for or against tenure, they may play no role in the actual tenure decision, made at a higher level. In the present case the tenure decision was made by Northwestern's provost, and there is no evidence that he was influenced by the fact that Blasdel is a woman. So she can prevail only by showing that the provost's decision was decisively influenced by someone who was prejudiced ...*(Id.)*. at 817.

The Court of Appeals decision ineffectively and erroneously analyzed the Circuit Court's decision without affording the correct amount of deference to the employment situation. As determined by the Circuit Court, Weickgenannt has failed to provide any evidence of discrimination or that the ultimate decision makers were influenced by the fact that she is a woman.

V. CONCLUSION

For the above reasons, the Appellant respectfully request this Court reverse the Court of Appeals' decision overturning the Circuit Court's Order of Summary Judgment in favor of the University. The Court of Appeals committed significant error by: (1) departing from clear precedent regarding the *McDonnell Douglas* burden-shifting

framework and failing to apply the correct standards regarding whether individuals are "similarly situated"; (2) misstating the University's reason for denying tenure; (3) determining the University's Non-Discriminatory Reason for Denying Tenure was a Pretext for Gender Discrimination and (4) refusing to acknowledge the unique and complex decision-making process that is used in public university tenure decisions. The implications of the decision of the Court of Appeals if not reversed could significantly confuse the analysis to be used in disparate treatment cases throughout the Commonwealth and especially within its academic institutions.

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